would no longer be possible and grave injustice would ensue.

Mr. Khoo as *amicus curiae* resisted the application. One of his grounds was that respondent was incarcerated for five years till July 1974 and that together with the lack of funds to proceed and the technical difficulties faced with the respondent having been adjudicated a bankrupt were the reasons for the delay in prosecution.

One could entertain these reasons if there was only a delay of a few years but here the delay was for over ten years. But what is of graver importance to the court is that through this inordinate delay important and indispensable witnesses for the applicants on whom they had to lean very heavily to support their cases have been made unavailable for their defences. For the applicants to prosecute their cases without these witnesses would be to put on them a burden which they through no fault of their own will be unable to discharge. For the court to place such a burden on them would be a gross travesty of justice.

For these reasons the applications in all three cases were allowed and the suits dismissed with costs for want of prosecution.

Applications allowed.

PUBLIC PROSECUTOR v. KHAIRUDDIN

[O.C.J. (Mohamed Azmi J.) June 20, 1981]
[Kuala Lumpur — Federal Territory Criminal Revision No. 2 of 1981]

Criminal Law and Procedure — Criminal Revision — Charges of criminal breach of trust and dishonest misappropriation against servant — Serious nature of offence — One day's imprisonment and fine — Sentence inadequate — Deterrent sentence in public interest necessary — Penal Code, s. 408.

The accused, a Credit Controller of a bank, pleaded guilty to one charge of criminal breach of trust, an offence under section 408 of the Penal Code, and to three charges of dishonest misappropriation of money under section 403 of the Penal Code. The accused admitted committing criminal breach of trust of $20,000 belonging to the bank on January 7, 1976, and dishonestly misappropriating $35,000 between May 14, 1975 and May 16, 1975; $24,975 on September 8, 1975 and $50,000 on December 10, 1975. On the criminal breach of trust charge, the learned President sentenced the accused to one day's imprisonment and a fine of $2,000 in default of which he would have to serve two months' imprisonment. On the misappropriation charge of $50,000 he sentenced the accused to one day's imprisonment and a fine of $3,000 in default, three months' imprisonment, and on the two other charges involving $35,000 and $34,975, the accused was sentenced to one-day's imprisonment and a fine of $2,000 in default two months' imprisonment on each count. The accused paid all the fines totalling $9,000.

The present court called for the records of the case to determine the propriety of the sentences passed by the Sessions Court.

Held: (1) although a trial court has the discretionary right and the duty to decide whether to be lenient or severe, such discretion and duty must be discharged according to established principles of assessing sentence;

(2) where a person is charged with more than one offence, it is the duty of the court to pass sentences in such a way that each sentence should reflect adequately the seriousness of each particular charge. In the present case, whilst the learned President had assessed the sentences on the three charges for dishonest misappropriation *inter se* adequately, he had failed to appreciate that the offence of CBT by a servant was serious in nature;

(3) public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would be offenders would be deterred;

(4) this is a proper case where the court should exercise its revisionary power and enhance the sentence on the criminal breach of trust charge from one day's imprisonment to eighteen months in addition to the fine of $2,000. The sentences imposed on the other three charges of dishonest misapproprition were affirmed.

Cases referred to:-

(1) *R.* v. *Ball* (1951) 35 Cr. A.R. 164, 165.

(2) *Wickrasooriya* v. *Public Prosecutor* [1964] M.L.J. 281.

(3) *R.* v. *Pugh & Rendell* (1981) Cr. L.R. 270.

(Cases cited but not mentioned in judgment: *Public Prosecutor* v. *Mohamed Ramly* [1974] 1 M.L.J. 95; *Lee Yew Siong* v. *Public Prosecutor* [1973] 1 M.L.J. 37.)

CRIMINAL REVISION.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the applicant.

S.T. Lee for the respondent.

Mohamed Azmi J. (delivering oral judgment): I have called for the records of this case with the view to determining the propriety of the sentences passed by the Kuala Lumpur Sessions Court on May 27, 1981.

The accused, a Credit Controller of Bank Rakyat Kuala Lumpur, pleaded guilty to one charge of criminal breach of trust, an offence under section 408 of the Penal Code, and to three charges of dishonest misappropriation of money under section 403 of the Code. On the charge of section 408, he admitted committing criminal breach of trust of $20,000 belonging to the Bank on January 7, 1976. On the other three charges, he admitted dishonestly misappropriating $35,000 between May 14, 1975 and May 16, 1975; $24,975 on September 8, 1975 and $50,000 on December 10, 1975. The criminal breach of trust offence was discovered in December 1979 by ASP Chow Keng Hock on investigating into the audit report of Messrs. Price Waterhouse on the Bank; whilst the other three charges of dishonest misappropriation were discovered in March 1977 by Encik Tajuddin bin Amiruddin, an Executive Officer of the Bank. On the criminal breach of trust charge, the learned President sentenced the accused to one day's imprisonment and a fine of $2,000 in default two months. On the misappropriation charge of $50,000, he sentenced the accused to one day's imprisonment and a fine of $3,000 in default three months, and on the two other charges involving $35,000 and $34,975, the accused was sentenced to one day's imprisonment and a fine of $2,000 in default two months on each count. The accused paid all the fines totalling $9,000; and for the one day's imprisonment, it can be assumed that he was released when the court adjourned for the day.

It is my view that having regard to the serious nature of the criminal breach of trust (CBT) charge by a servant under section 408 which carries a maximum punishment of seven years' imprisonment and also fine, and coupled with the large sum of $20,000 misappropriated, the sentence of one day's imprison-

ment and $2,000 fine appears excessively inadequate as it does not reflect the seriousness of the offence and the manner in which the crime was committed. Although a trial court has the discretionary right and the duty to decide whether to be lenient or severe, such discretion and duty must be discharged according to established principles of assessing sentence. In this case, the extent of the inadequacy of the sentence does not appear to be very apparent in respect of the three charges under section 403 although a total sum of $109,975 was involved, since the offence merely carries a maximum punishment of two years' imprisonment or fine or both. Be that as it may, in assessing sentence, the learned President did not seem to make any distinction between the case of CBT by a servant and a case of dishonest misappropriation. He seems to have treated all the four offences as if they were preferred under the same section of the Penal Code; and looking at the sentences imposed, he seems to have considered the offence of CBT by a servant to be of same gravity as that of dishonest misappropriation. In my view, where a person is charged with more than one offence, it is the duty of the court to pass sentences in such a way that each sentence should reflect adequately the seriousness of each particular charge. Whilst the learned President had, it appears, assessed the sentences on the three charges for dishonest misappropriation *inter se* adequately, he had apparently failed to appreciate that the offence of CBT by a servant is more serious in nature. As was held by the Court of Criminal Appeal in *R.* v. *Ball,*[1] a case relied upon by the learned President:

"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."

I am conscious of the legal principle that an Appellate Court should only alter a sentence when it appears to err in principle. For this reason, the learned President has at my request supplied me with his grounds of judgment. In assessing sentence, the learned President had taken into consideration that the accused had pleaded guilty; he had made full restitution of the money misappropriated; he was a first offender; there was mismanagement in Bank Rakyat at that time, and that he had not profited from the crime. In this case, the accused was the Credit Controller of the Bank at the relevant times. As a responsible officer of the Bank, he had betrayed the trust given to him by squandering a total sum of $129,975 between May 14, 1975 and June 7, 1976. This, the learned President, had apparently failed to appreciate. All the four offences were committed with such degree of deliberation and dishonesty that I fail to see how it can be said that he had not profited from the crime. I am also unable to understand how the fact that there was a mismanagement of the Bank and the accused taking advantage of it, can constitute a mitigating factor. The case of *Wickrasooriya* v. *Public Prosecutor,*[2] which involved criminal breach of trust by a servant, appears to be relevant. In that case, the appellant, an accountant employed by Sime Darby & Co. Malacca, was convicted on two charges of CBT under section 408 of the Penal Code involving small sums of $39.70 and $12 respectively. The trial President sentenced him to three years' imprisonment on each charge, the sentences to run concurrently. Ismail Khan J. (as he then was) dismissed the appeal and up-held the conviction and sentence. That case was decided in 1964, and since then it is common knowledge that the economy of this country has expanded many times over. The number of people placed in position of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means. In my view, the court would be failing in its duty if it does not consider CBT by a servant in the private sector just as serious as a CBT by a public servant. As was held in *R.* v. *Pugh & Rendell*[3]:

"... dishonesty by persons in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business."

In that case, Pugh, a fifty-five year-old director of company with no previous conviction, pleaded guilty to theft in breach of trust in respect of sale of zinc scraps worth £4,000, and his appeal against sentence of twelve months' imprisonment was dismissed.

In this case, I am of the view that the learned President had taken the fact of full restitution made by the accused as the major ground for imposing fines and one day's imprisonment, without sufficient regard to public interest. Much as I dislike sending a person to prison, I am of the view that the sentences imposed by the learned President erred in principle. In assessing sentence, a court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so. Apart from full restitution, there was no actual extenuating circumstances in this case to warrant a lenient sentence of one day's imprisonment and $9,000 fine for pilfering a total sum of $129,975. Clearly, such sentence does not reflect the gravity of the offences and would only encourage others to commit the same crime with impunity. Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and co-operative banks and similar institutions, prepared to pilfer the till. I have taken into consideration that the accused was a first offender and had pleaded guilty, and I have also taken into account that the Public Prosecutor has not appealed against sentence, although the Deputy Public Prosecutor, Encik Shaikh Daud, is not objecting to a revision. Nevertheless, I am of the view that this is a proper case where the court should exercise its revisionary power and enhance the sentence at least on the CBT charge. I therefore order that on the CBT charge, the sentence of one day's imprisonment be enhanced to eighteen months in addition to the fine of $2,000 (Case A.C.C.M. 510/80). With reluctance I affirm the sentences imposed on the other three charges of dishonest misappropriation (Case A.C.C.M. 376/80).

Order accordingly.

Solicitors: *Low & Lee.*